RESCISSION FOR BREACH OF CONTRACT WITHOUT REPUDIATION. — The weight of English authority is to the effect that while acts indicating an intention to abandon a contract justify the aggrieved party in rescinding, mere breach in performance, without repudiation, cannot warrant rescission.[1] A recent *dictum*, to the same effect, in an Australian case following an earlier decision in the same jurisdiction,[2] is indicative of the tendency of the provincial courts to adhere implicitly to the English doctrine. *Moroney* v. *Roughan*, 29 Victorian L. Rep. 541. It has been pointed out in an earlier volume that the real reason the aggrieved party is ever allowed to rescind, lies in the other's failure to do what he promised, rather than in what he thinks or says, so that the English rule is hardly logical in making the right to rescind dependent wholly on whether or not the defaulting party intends to abandon his contract.[3]

An English case decided in 1859 allowed rescission on the ground of insufficient delivery of the first instalment of an iron contract.[4] This doctrine has given way in England to that of the more recent cases noted above, but it has been very generally followed in the United States, and has been extended even to cases where the breach was not *in limine*.[5] In fact, rescission is often allowed for comparatively slight delay, provided notice is at once given by the innocent party of his intention to abandon the contract.[6] While avoiding the undue strictness of the English courts in requiring that an intention to put an end to the contract must be shown if rescission is to be permitted, it is possible that our courts go too far in the opposite direction, and tend to allow rescission for too insignificant a breach. Thus it has been held in the Circuit Court of Appeals that where, under a year's contract for furnishing coke, payment was to be made on the twentieth of each month for the deliveries of the preceding month, the party to whom the money was payable might rescind the contract on the twenty-third, if the sum was still unpaid.[7] There are of course many cases where the breach is so serious that the only solution fair to the innocent party is to allow rescission. But in the ordinary case of delayed performance, although the law should allow the innocent party to postpone the execution of his own promises until the other's obligations are performed, it is only fair that absolute cancellation be delayed until the breach has become material. To allow either party, on a comparatively unimportant deviation by the other from the terms of the contract, the choice between enforcing or avoiding it, according as the state of the market makes it profitable or unprofitable for him, is too severe a penalty to impose on one in slight default. It seems clear that rescission should be allowed for failure to perform as well as for repudiation, but only when the breach is material.

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[1] Freeth *v.* Burr, L. R. 9 C. P. 208; Cornwall *v.* Henson, [1900] 2 Ch. 298.
[2] Bradley *v.* Bartoumieux, 17 Victorian L. Rep. 144.
[3] 14 HARV. L. REV. 317, 324, n.
[4] Hoare *v.* Rennie, 5 H. & N. 19.
[5] Norrington *v.* Wright, 115 U. S. 188; Kokomo Strawboard Co. *v.* Inman, 134 N. Y. 92. But see Gerli *v.* Poidebard Silk Co., 57 N. J. Law 432.
[6] Rugg & Bryan *v.* Moore, 110 Pa. St. 236.
[7] Hull Coal & Coke Co. *v.* Empire Coal & Coke Co., 113 Fed. Rep. 256.